[redacted]

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	3
Statutes involved	4
Statement	14
Summary of argument	23
Argument:	
I. The voting of the shares and direction of the corporations' affairs incident to the voting power are executive functions, of which, under the organic act, the legislature may not deprive the Governor General	26
II. If the members of the board of control and of the committee exercise executive functions, then the selection and appointment of the members is itself an executive function which may not be performed by the legislature	47
III. If the acts of the Philippine Legislature in question were in conflict with the organic act and void, the fact that Congress did not declare them void has not rendered them valid	53
Conclusion	55

CITATIONS

Cases:	
Abueva v. *Wood*, 45 Phil. 612	27
Alejandrino v. *Quezon*, 46 Phil. 83	28
A., T. & S. F. Ry. Co. v. *Sowers*, 213 U. S. 55	55
Bank of the United States v. *Planters' Bank of Georgia*, 9 Wheat. 904	42
Barcelon v. *Baker* (1905), 5 Phil. 87	28
Berryman v. *Whitman College*, 222 U. S. 334	54
Chesapeake & Delaware Canal Co. v. *United States*, 250 U. S. 123	42
Clallam County v. *United States*, 263 U. S. 341	42
Clark v. *Stanley*, 66 N. C. 59	39, 40, 41
Clayton v. *Utah*, 132 U. S. 632	54
Fajardo Sugar Co. v. *Holcomb*, 16 F. (2d) 92	55
Gallardo v. *Porto Rico, etc., Co.*, 18 F. (2d) 918	55

Cases—Continued.

	Page
Howerton v. *State*, 68 N. C. 546	41
Kilbourn v. *Thompson*, 103 U. S. 168	27, 48
Members of the Legislature, In re, 49 Fla. 269	49
McCulloch v. *Maryland*, 4 Wheat. 316	43
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514	49
Myers v. *United States*, 272 U. S. 52	27, 28, 31, 49, 52, 53
National Coal Co. v. *Collector of Internal Revenue*, 46 Phil. 583	43
Opinion of the Justices, 204 Mass. 607	43
Osborn v. *The Bank of the United States*, 9 Wheat. 739	43
Severino v. *Governor General*, 16 Phil. 366	28
Shoemaker v. *United States*, 147 U. S. 282	50
Stockman v. *Leddy*, 55 Colo. 24	41
Tiaco v. *Forbes*, 228 U. S. 549	54
United States v. *Bull*, 15 Phil. 7	28
United States v. *Hartwell*, 6 Wall. 385	49
United States v. *Strang*, 254 U. S. 491	49
United States Shipping Board Emergency Fleet Corporation v. *Western Union Telegraph Co.*, No. 113, October Term, 1927; decided January 3, 1928	42, 43
Statutes:	
Act of Feb. 25, 1791, c. 10, sec. 11, 1 Stat. 191, 196	33
Act of Apr. 10, 1816, c. 44, 3 Stat. 266	33
Act of Mar. 3, 1825, c. 76, 4 Stat. 124	34
Act of Mar. 2, 1829, c. 27, 4 Stat. 350	34
Federal farm loan act of July 17, 1916, c. 245, 39 Stat. 360	34
Organic act (Jones Law) of Aug. 29, 1916, c. 416, 39 Stat. 545; U. S. C., title 48, secs. 1041 *et seq.*—	
Sec. 4	44
Sec. 7	13
Sec. 8	13
Sec. 9	44
Sec. 12	13
Sec. 18	13
Sec. 19	13, 53
Sec. 20	27
Sec. 21	13
Sec. 22	14, 23, 28
Act of Sept. 7, 1916, c. 451, sec. 11, 39 Stat. 728	36
Food control act of Aug. 10, 1917, c. 53, Sec. 2, 40 Stat. 276	35
War Finance Corporation act of Apr. 5, 1918, c. 45 40 Stat. 506	37
Act of July 9, 1918, c. 143, Chap. XVI, 40 Stat. 845	37
Act of June 4, 1918, c. 92, 40 Stat. 594, 595	37
Act of Aug. 24, 1921, c. 80, 42 Stat. 181	37
Agricultural credits act of 1923 (act of Mar. 4, 1923), c. 252, 42 Stat. 1454, 1474	35
Act of June 3, 1924, c. 243, 43 Stat. 300	38

Statutes—Continued. Page
Philippine Laws—
No. 1459, Mar. 1, 1906 (General Corporation Law), sec. 34 12
No. 2612, Feb. 4, 1916—
Sec. 2(f) 5
Sec. 3 5
Sec. 4 5
Sec. 5 5
Sec. 20 6
Sec. 21 6
Sec. 26 6
Sec. 47 6
Sec. 51 6
No. 2705, Mar. 10, 1917—
Sec. 2 4
Sec. 4 4
Sec. 6 4
No. 2719, May 14, 1917, sec. 14 43
No. 2747, Feb. 20, 1918—
Sec. 4 7
Sec. 5 7
No. 2814, Mar. 4, 1919 46
No. 2822, Mar. 5, 1919 4
No. 2849, Mar. 10, 1919 46
No. 2855, Mar. 12, 1919 46
No. 2862, Mar. 12, 1919 46
No. 2938, Jan. 30, 1921—
Sec. 3 7
Sec. 4 7
Sec. 8 8
Sec. 10(f) 8
Sec. 14 9
Sec. 16 9
Sec. 17 9
Sec. 18 9
Sec. 22 9
Sec. 23 10
Sec. 38 11
Sec. 44 11
Sec. 45 11
No. 3174, Nov. 24, 1924 42, 46
Penal Code, Art. 401 49
Miscellaneous:
Executive order of the President of May 9, 1904 34
Executive order No. 2681 36
Report of the Governor General of the Philippine Islands for 1918, p. 8 43
Report of the Governor General for 1926, p. 5 46

Miscellaneous—Continued.

	Page
Report of the Isthmian Canal Commission, 1905, p. 18	34
House Report No. 2205, 55th Cong., 3d sess., vol. 2	50, 52
Hearings before Committee on Agriculture, House of Representatives, 63d Cong., 3d sess., on H. J. Res. 444, pp. 102, 124, Official Bulletin, July 12, 1918	36
Report War Trade Board, 204	38
War Trade Board Journal, No. 16, p. 4	38
Report of United States Housing Corporation, 1920, vol. 1, p. 59	37
Executive Order of Governor General of Philippine Islands, No. 37, issued November 9, 1926 (Phil. Offic. Gaz., vol. 24, No. 135, Nov. 11, 1926, p. 2419)	21
Handbook of Economic Agencies of the War of 1917, p. 436	38
History of the Spruce Production Division, 83	38
Cooley on taxation, vol. 1, sec. 211	43
Cooley, Constitutional Limitations (7th ed.), p. 131	31
U. S. C., title 20, secs. 41–67	51
U. S. C., title 24, secs. 71 et seq	51
U. S. C., title 40, secs. 1 et seq	52
Report of the Philippine Commission to the Secretary of War, dated April 6, 1916	42
Letter of Governor General Wood to Chief of the Bureau of Insular Affairs, dated August 15, 1923	20, 21

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 564

MILTON E. SPRINGER, DALMACIO COSTAS, AND Anselmo Hilario, petitioners

v.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS

No. 573

GREGORIO AGONCILLO, BALDOMERO ROXAS, AND Catalino Lavadia, petitioners

v.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the Supreme Court of the Philippine Islands (No. 564, R. 69; No. 573, R. 217) have not yet appeared in the official Philippine reports, but the opinion in No. 564 is published in the Offi-

cial Gazette of the Philippines, No. 56, May 10, 1927, p. 1232; and the opinion in No. 573 is published in the Official Gazette, No. 67, June 4, 1927, p. 1488.

JURISDICTION

The final judgments of the Supreme Court of the Philippine Islands were entered on April 11, 1927. (Case No. 564, R. 212; Case No. 573, R. 270.)

The petition for certiorari in case No. 564 was filed September 28, 1927, and that in case No. 573 on October 1, 1927, and the petitions were granted November 21, 1927. (Case No. 564, R. 215; Case No. 573, R. 272.) In each case the petition was filed within six months from the date of the judgment.

In each case the question is whether an Act of the legislature of the Philippine Islands is in conflict with the Act of Congress known as the Jones law, which constitutes the Organic Act of the Philippine Islands, and the Supreme Court of the Philippines held that the Acts of the Philippine legislature are in conflict with the Act of Congress, so that a statute of the United States is involved in each case.

Section 7 of the Act of February 13, 1925, gives this Court power to review by certiorari a final judgment of the Supreme Court of the Philippines in any case "wherein * * * any statute * * * of the United States is involved." Section 8(a) of the Act of February 13, 1925, provides that "writs of certiorari to the Supreme Court of the Philip-

pine Islands may be granted where application therefor is made within six months" after the entry of the judgment to be reviewed.

QUESTIONS PRESENTED

The questions presented are whether Acts of the Philippine legislature, which place in a "Board of Control" or "Committee," consisting, *ex officio*, of the Governor General, the President of the Philippine Senate, and the Speaker of the House of Representatives, power to vote government-owned shares of stock of the Philippine National Bank and the National Coal Company, of which the Philippine government owns more than a majority, and power thereby to select, appoint, and remove the managing officers and directors of those corporations, with the resulting power to control and direct the operations and management of those corporations, are in conflict with the Organic Act under which the Philippine government is organized, which effects a separation of legislative, executive, and judicial power, and confers the executive power on the Governor General, gives him general supervision of all departments and bureaus of the government, and directs that all executive functions of the government must be directly under him or within one of the executive departments under his supervision and control.

The ultimate question is whether the power to vote the stock of the two corporations and to select and remove their managing agents and officers, and

through that power to exercise continued control and supervision over the operations and conduct of the business of these two corporations are executive or legislative functions.

STATUTES INVOLVED

The charter of the National Coal Company is found in Act of the Philippine Legislature No. 2705, approved March 10, 1917, the pertinent sections of which are as follows:

> SEC. 2. The said company shall be subject to the provisions of the Corporation Law in so far as they are not inconsistent with the provisions of this Act * * *.
>
> SEC. 4. The Governor General on behalf of the Government of the Philippine Islands shall subscribe for fifty-one per centum of said capital stock, and the remainder shall be offered to the public. * * * The voting power of all such stock owned by the Government of the Philippine Islands shall be vested exclusively in a committee consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives.
>
> SEC. 6. (Appropriates 1,530,000 pesos for investment in the stock.)

Act No. 2822, approved March 5, 1919, directed the Governor General to subscribe for at least 51% of said capital stock of the National Coal Company instead of for exactly 51% as originally provided.

The charter of the Philippine National Bank is found in Act No. 2612, approved February 4, 1916, the pertinent provisions of which are as follows:

> SEC. 2. The said National Bank * * * shall have power * * *
>
> (*f*) To exercise, further, the general powers mentioned in the Corporation Law in so far as they are not inconsistent or incompatible with the provisions of this Act.
>
> SEC. 3. (Fixes capital at 20,000,000 pesos; 200,000 shares; 100 pesos per share.)
>
> SEC. 4. The Government of the Philippine Islands not later than January thirty-first, nineteen hundred and seventeen, shall purchase one hundred and one thousand shares, at par, of the said National Bank, the payment for said shares of the Government to be made as hereinafter provided. Ninety-nine thousand shares of said capital stock shall be offered to the public at par, as hereinafter provided.
>
> SEC. 5. (Appropriates for the payment of Government shares, 1,300,000 pesos out of general funds of the Insular Treasury, and the further sums of 1,000,000 pesos on or before July 31, 1916, and 1,000,000 pesos on or before January 31, 1917, "which shall be invested from the insurance fund created by Act No. 1728, the public works bonds sinking fund, created by Act No. 1729, and the friar lands bonds sinking fund, created by Act No. 2550.") * * * "*And provided further*, That the voting power of all stock purchased directly by the Philippine Government as an

investment from the general funds of the Government, and the voting power of all stock purchased for the benefit of the insurance fund, of the public works bonds sinking fund, and of the friar lands bonds sinking fund, shall be vested exclusively in the Governor General.

SEC. 20. The affairs and business of the National Bank shall be managed by a board of directors consisting of the president of the Bank, who shall be chief executive thereof and chairman of the board at the same time, one vice president, who shall assist the president and act in his stead in case of absence or incapacity, and five members elected as hereinafter provided. * * *.

SEC. 21. The president and vice president shall be appointed by the Governor General, by and with the consent of the upper house of the Philippine Legislature, and may be removed for cause by said Governor General, by and with the consent of said house. The five remaining members shall be elected and may be removed in accordance with the provisions of Act No. 1459, the Corporation Law.

SEC. 26. The Insular Auditor shall be *ex officio* auditor of the National Bank. * * *.

SEC. 47. All profits assigned as dividends to the shares of the Government shall be paid into the Insular Treasury, for the general funds thereof, and shall be available for any appropriation.

SEC. 51. The board of directors of the National Bank is hereby authorized to adopt

the necessary regulations for its operation, in conformity with this Act and the Corporation Law.

Act No. 2747, approved February 20, 1918, amended the previous Act relating to the Philippine National Bank as follows:

SEC. 4. * * * The voting power of all the stock of the National Bank owned and controlled by the Government of the Philippine Islands shall be vested exclusively in a committee consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives.

SEC. 5. (Amends Section 5, *inter alia*, by striking out the original provision which had placed in the Governor General the voting power of the Government stock.)

Act No. 2938, approved January 30, 1921, amended the charter of the Philippine National Bank in the following particulars:

SEC. 3. (Increases Bank's capital from 20,000,000 pesos to 50,000,000 pesos by a new "second" issue of 300,000 shares.)

SEC. 4. The Government of the Philippine Islands, not later than June 30, 1921, shall purchase all remaining shares of the first issue and part of those of the second issue to the aggregate number of not less than one hundred and fifty-three thousand, at par, the payment for said shares of the Government to be made as hereinafter provided. The remaining shares may be offered to the provincial and municipal governments or to

the public at a price not below par which the board of directors of the bank shall from time to time determine: *Provided*, That the Government of the Philippine Islands, upon agreement with the board of directors of the bank, may at any time after June 30, 1921, purchase all or part of the stock on hand at a price not below par.

The voting power of all the stock of the National Bank owned and controlled by the Government of the Philippine Islands shall be vested exclusively in a board, the short title of which shall be "Board of Control," composed of the Governor General, the President of the Senate, and the Speaker of the House of Representatives.

SEC. 8. At no time shall shares be sold to the public if, as a result thereof, the part of the capital stock held by private investors will equal or exceed the part owned by the Government of the Philippine Islands.

SEC. 10. Said National Bank is hereby authorized:

* * * * *

(*f*) To invest a sum not exceeding ten per cent of its paid-up capital in the purchase of shares of stock of any banking corporation constituted under the laws of any State of the United States and to hold the same: *Provided, however,* That, subject to resolution of the board of directors and the approval of the Board of Control, it may incorporate any of its foreign agencies now or hereafter established, under the laws of the

country or estate (State) where the same may be located, and may retain the stock of such corporation as an investment.

SEC. 14. Said National Bank is hereby authorized to issue circulating notes * * *: *Provided, however*, That in cases of emergency, and subject to the approval of the Board of Control, the Secretary of Finance may authorize the National Bank to rediscount commercial paper of not over six months' maturity, secured by exports or imports, and may issue against said commercial paper circulating notes * * *.

SEC. 16. (Increases number of directors to nine.)

SEC. 17. (Directors to elect president and vice-president from amongst themselves.)

SEC. 18. The orders and resolutions of the board of directors shall be carried out by a general manager who shall be chief executive of the bank and shall be paid an annual salary to be fixed by the board of directors with the approval of the board of control, and an assistant general manager, who * * * shall be paid a salary to be fixed by the board of directors, with the approval of the board of control. The general manager shall be appointed by the board of directors, with the advice and consent of the board of control, and may be removed in a like manner.

SEC. 22. The Insular Auditor shall be *ex officio* auditor of the National Bank and shall, with the advice and consent of the

board of control, appoint a representative who shall be chief of the auditing department of the bank. All the other employees of the department shall be appointed by the Insular Auditor who, with the approval of the board of control, shall fix the salaries of the same as well as that of his representative, the chief of the department. * * * The representative of the Insular Auditor shall make a quarterly report on the condition of the bank to the Governor General of the Philippine Islands, through the Secretary of Finance, to the Board of Control, to the Insular Auditor, and to the board of directors of said bank. * * *.

SEC. 23. All the other officers and employees of the National Bank shall be appointed and removed by the Board of Directors, on recommendation of the general manager. Said officers and employees shall not be subject to the Civil Service Law, and their duties and compensations shall be fixed by the general manager, with the approval of the board of directors: *Provided, further*, That whenever the president or vice president, by order of the Board of Directors, shall temporarily or permanently perform duties incumbent upon other officers or employees, they may be granted compensation additional to the bonus fixed by this Act for the president and vice president; but the resolution of said board shall not take effect until the written approval of the members of the Board of Control has been obtained. The orders of said board of directors in this

respect may be modified or repealed at any time, provided they are approved in each case by the Board of Control.

SEC. 38. All profits assigned as dividends to the shares of the Government shall be paid into the Insular Treasury, for the general funds thereof.

SEC. 44. The National Bank shall at all times keep on hand * * * a sum in lawful money * * * computed as follows:

Twenty-five per cent of the circulating notes outstanding * * *.

Twenty per cent of the demand deposits outstanding * * *: *Provided, however,* That the Secretary of Finance, at the request of the board of directors of the bank, duly approved by the Board of Control, whenever in his judgment the general interests of the country require it, shall be authorized to suspend for such period as may be necessary the requirement of maintaining the proportion of the reserve specified in this Act. * * *.

SEC. 45. The National Bank is hereby authorized to guarantee * * * bonds issued by duly incorporated companies for the erection of an addition or additions to industrial plants or manufactories principally used for the manufacture and preparation of the products of the Philippine Islands: *Provided, however,* That such guarantee shall only be lawful when approved by the Board of Control.

Subject to the same approval, the National Bank is hereby authorized to purchase bonds

> issued by any duly incorporated company engaged in the manufacture or preparation of products in the Philippine Islands. * * *.

The by-laws of the bank provide (R. 63):

> SEC. 40. The stockholders at any regularly called meeting shall have the following powers:
>
> * * * * *
>
> (c) To exercise any powers not expressly conferred upon the Board of Directors or any executive officer of the Bank, and not in conflict with the charter of the Bank, or with the Corporation Law.

The General Corporation Law of the Philippine Islands, found in Act No. 1459, approved by the Philippine Commission March 1, 1906, contains the following:

> SEC. 34. Directors of a corporation may be removed from office by vote of two-thirds of the members entitled to vote, or, if the corporation be a stock corporation, by a vote of the stockholders holding or representing two-thirds of the subscribed capital stock entitled to vote: *Provided, however,* That such removal shall take place either at a regular meeting of the corporation or at a special meeting called for the purpose * * *.

The Organic Act, known as the Jones Law, approved August 29, 1916 (c. 416, 39 Stat. 545; U. S. C. Title 48, Sections 1041 et seq.), contains the following provisions:

SEC. 7. That the legislative authority herein provided shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify, or repeal any law, civil or criminal, continued in force by this Act as it may from time to time see fit.

* * * * *

SEC. 8. That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, authorized by this Act.

SEC. 12. That general legislative powers in the Philippines, except as herein otherwise provided, shall be vested in a legislature which shall consist of two houses, one the Senate and the other the House of Representatives, and the two houses shall be designated "The Philippine Legislature":

* * *.

SEC. 18. * * *. Both houses shall convene at the capital * * * and organize by the election of a Speaker or a presiding officer, a clerk, and a sergeant at arms for each house, and such other officers and assistants as may be required.

SEC. 19. * * *

All laws enacted by the Philippine Legislature shall be reported to the Congress of the United States, which hereby reserves the power and authority to annul the same.

* * *.

SEC. 21. That the supreme executive power shall be vested in an executive officer, whose official title shall be "The Governor General of the Philippine Islands." * * *

97812—28——3

He shall, unless otherwise herein provided, appoint, by and with the consent of the Philippine Senate, such officers as may now be appointed by the Governor General, or such as he is authorized by this Act to appoint * * *. He shall have general supervision and control of all of the departments and bureaus of the government in the Philippine Islands as far as is not inconsistent with the provisions of this Act * * *. * * * He shall commission all officers that he may be authorized to appoint. He shall be responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine Islands * * *. * * *

SEC. 22. * * * The Philippine Legislature may thereafter by appropriate legislation increase the number or abolish any of the executive departments, or make such changes in the names and duties thereof as it may see fit, and shall provide for the appointment and removal of the heads of the executive departments by the Governor General: *Provided*, That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General. * * *

STATEMENT

These actions were instituted in the Supreme Court of the Philippine Islands by the Government of the Philippines to oust the petitioners from po-

sitions as directors of the Philippine National Bank or of the National Coal Company, corporations, a majority of the stock of which is owned by the Philippine Government. The grounds for the suits were that the petitioners had been elected to the offices of directors of one or the other of these corporations, by vote of the government-owned shares, cast by the President of the Philippine Senate and the Speaker of the House of Representatives, majority members of a committee or board of control created by Acts of the Philippine Legislature, with power to vote the Government's shares, and that voting the stock and electing the directors and managing agents of these corporations and governing their operations in these and other ways provided by these Acts, were executive functions entrusted by the Organic Act to the Governor General, and that the Acts of the Philippine Legislature divesting him of these powers were in conflict with the Organic Act. The Supreme Court of the Philippine Islands sustained these contentions and ousted these petitioners from their respective offices as directors.

The National Coal Company, case No. 564, *Springer et al.* v. *The Government of the Philippine Islands*, was disposed of on a demurrer to the bill of complaint, and the material facts are those contained in the complaint and admitted by the demurrer. (R. 70.)

The National Coal Company was chartered by the Act of March 10, 1917, and was given the gen-

eral powers provided in the General Corporation Law, and was authorized "to prosecute the business of developing coal deposits in the Philippine Islands, and of the mining, extracting, transporting, and selling the coal contained in said deposits." The capital stock was fixed at 3,000,000 pesos, divided into 30,000 shares. It was provided that the Governor General, on behalf of the Philippine Islands, should subscribe for 51% of the stock, and that the remainder should be offered to the public, and that the voting power of the stock owned by the government of the Philippine Islands should be vested "in a committee consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives." By the Act of March 5, 1919, the Governor General was directed to subscribe for at least 51% of the stock. Of the 30,000 outstanding shares of the National Coal Company the Philippine Islands own 29,881 shares. (R. 34.)

A special meeting of the shareholders of the corporation was held December 6, 1926, for the purpose, among other things, of electing directors, the regular annual meeting, which should have been held in August, not having been attended by a quorum. (R. 4.) At this special meeting the Governor General, assuming the invalidity of the provision of the charter of the Coal Company vesting the voting power in the committee, of which the President of the Senate and the Speaker of the House of Representatives were *ex officio* members,

assumed to exercise the voting power and cast the vote of the government-owned shares for the election of five directors. (R. 5.) The President of the Senate and the Speaker of the House of Representatives, on the other hand, constituting a majority of the committee established by the charter, assumed to cast the vote of the government-owned shares for candidates selected by them. (R. 9, 10.) The petitioners, Springer, Costas and Hilario, were voted for by the President of the Senate and the Speaker of the House of Representatives, and not by the Governor General. Two others of the five directors to be elected were voted for by the Governor General and by the two members of the Legislature, so their elections are not in dispute. The three petitioners have since assumed to act as directors of the Coal Company, and to test their title to the positions this suit, in the nature of *quo warranto*, was instituted.

The Philippine National Bank Case, No. 573, was disposed of below on the admissions in the pleadings and on a stipulation of facts. (R. 165.) The National Bank was chartered by the Act of February 4, 1916, with an authorized capital of 20,000,000 pesos, divided into 200,000 shares, of which the Government was to purchase 101,000 shares. Originally, the voting power of the government-owned stock was placed in the hands of the Governor General, and there was also placed in his hands the power to appoint and remove, with the

consent of the Philippine Senate, the president and vice president of the bank, the president to be the chief executive officer of the bank. By the Act of February 20, 1918, the Governor General was deprived of the voting power of the government-owned stock, and it was vested in a "committee" consisting *ex officio* of the Governor General, the President of the Senate, and the Speaker of the House of Representatives. By the Act of January 30, 1921, the bank's charter was again amended so as to increase its authorized capital to 50,000,000 pesos, resulting in an additional authorized issue of 300,000 shares, and the Act provided that the Philippine Government should purchase all the remaining shares of the first issue and not less than 153,000 shares of the second issue, and that the Philippine Government should at all times retain a majority of the stock. This Act provided that the voting power of the stock of the Bank should be "vested exclusively in a board, the short title of which shall be 'Board of Control,' composed of the Governor General, the President of the Senate, and the Speaker of the House of Representatives." The appointment of the president and vice-president of the bank was taken from the Governor General by provision that they should be elected by the directors from among their own number, and the president was no longer to be the bank's chief executive, but by Section 18 a general manager was provided for, to be appointed or removed by the board of

directors, with the advice and consent of the Board of Control and to be "chief executive of the bank" and to be paid an annual salary to be fixed by the Board of Directors, "with the approval of the Board of Control." It was further provided that the chief of the auditing department of the bank should be appointed by the Insular Auditor "with the advice and consent of the Board of Control." The Board of Control was given further administrative duties in the management of the bank. The Philippine Government acquired practically all of the bank's issue of capital stock, so that on January 17, 1927, of 100,000 shares outstanding, 97,332 belonged to the Philippine Government, and only 2,668 to private individuals. (R. 199.)

The National Bank was given power to loan money on the security of real estate, to make loans on commercial paper, to make loans secured by lien or chattel mortgage on harvested or stored crops, to make loans to agriculturists, to issue and sell bonds up to 90% of real estate loans held by the bank, to issue notes intended to circulate as money, which while not made legal tender were made receivable in payment of taxes and all claims owing to the Government, and generally was to do a banking business, to act as a depository for public funds, and as a fiscal agent for the Insular, Provincial, and Municipal Governments. (R. 45, case 573.)

The President of the Senate and the Speaker of the House of Representatives hold their offices

during the pleasure of these branches of the Legislature.

The General Corporation Act provides that the directors of a corporation may be removed from office by vote of two-thirds of the stockholders, so that the President of the Senate and the Speaker of the House of Representatives, acting *ex officio* as members of the Board of Control and exercising the voting power of the Government stock, may remove directors at any regular meeting or at a special meeting called for that purpose. Under the by-laws, special meetings of the stockholders may be held on 15 days' notice. (R. 64.) The representatives of the two branches of the Legislature sitting on the Board of Control and constituting a majority of its membership, and exercising the voting power of the stock of the Philippine National Bank, retain continued domination and control over its affairs through the power to select the directors and chief executive and to remove them at will, and in this way, and by virtue of the other provisions of the amended charter allowing them to participate directly in the management of the Bank's affairs, to completely control the officers and directors of the bank in the conduct of the bank's business.

The operations of the National Coal Company and the Philippine National Bank seem to have been governed by these statutes until 1926, but their validity was not unquestioned. On August 15,

1923, Governor General Wood wrote to the Chief of the Bureau of Insular Affairs saying:

> I am inclosing herewith a list of the legislation, including many provisions of the Administrative Code, which attempt to curtail the power of supervision and control granted the Governor General in the Organic Act.

This list included the laws here in question and others.

On April 16, 1926, the Judge Advocate General of the Army gave an opinion to the Chief of the Bureau of Insular Affairs of the War Department (Appendix C, brief in opposition to petitions for certiorari), to the effect that the Acts of the Philippine Legislature, in so far as they deprive the Governor General of the power to vote the stock of these corporations and control their operations were void. The matter was then submitted to the Attorney General of the United States, who, on September 22, 1926, rendered an opinion to the same effect. (Appendix B, brief in opposition to petitions for certiorari.) Thereupon, the Governor General of the Philippine Islands, on November 9, 1926, issued Executive Order No. 37 (Philippine Official Gazette, Vol. 24, No. 135, November 11, 1926, p. 2419), in which, after referring to the opinions of the Judge Advocate General and the Attorney General, he directed that thereafter "the duties and powers heretofore exercised by said 'Board of Control' or 'Committee' " shall be exer-

97812—28——4

cised solely by the Governor General "pursuant to the executive power vested in him by the Organic Act."

A special meeting of the stockholders of the Philippine National Bank was called and duly held January 17, 1927, the stated purpose being, among other things, to consider the removal of Directors Agoncillo, Roxas, and Lavadia, petitioners in No. 573. (R. 186.) At that meeting the Governor General attended and assumed to represent the shares of stock owned by the Government. (R. 190.) The President of the Senate and the Speaker of the House of Representatives absented themselves from the meeting and declined to participate in its proceedings. The President of the Bank thereupon held that no quorum was present, as the Governor General had no power alone to represent the Government's shares (R. 196), and declared the meeting adjourned (R. 198). The Governor General and some 20 other persons owning shares of the Philippine National Bank remained at the meeting place and organized a meeting by the election of a chairman and secretary pro tem. (R. 198.) At that meeting the Governor General cast the vote of the shares owned by the Government for the removal from the office of director of the petitioners, Agoncillo, Roxas, and Lavadia, and cast his vote for the election of three other men to fill their places, and a fourth to fill another vacancy. (R. 207.) The three directors thus re-

moved by the vote of the Governor General have continued to assert the right to exercise the functions of directors of the Bank, and to oust them this suit was instituted.

SUMMARY OF ARGUMENT

I. The Organic Act under which the government of the Philippine Islands is organized is the fundamental law for the Philippines and any Act of the Legislature in conflict with that Organic Act is void. That Act conforms to our constitutional practice and provides for the separation of the executive, legislative, and judicial functions, and excludes the Legislature from exercising any function not legislative, with certain expressed exceptions. It is more specific in that in Section 22 it expressly provides:

> That all executive functions of the Government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General.

The Acts of the Philippine Legislature, read in connection with other statutes relating to the Philippine National Bank, the National Coal Company, and corporations in general, have the effect of stripping the Governor General of all direction or control over the Bank or Coal Company and of vesting the direction of the management and operation of those institutions in representatives of the two Houses of the Legislature selected by those Houses.

The President of the Senate and the Speaker of the House of Representatives are selected by those bodies and hold office during their pleasure. They, in turn, acting together on the so-called Board of Control, elect and remove the managing directors and agents of these corporations, and in the case of the Bank they also directly participate with those officers and agents in conducting the bank's affairs. The effect of these provisions is that the majority in the Legislature, acting through representatives doing their bidding, from day to day direct and control the operations and management of these institutions.

The selection and removal of the managing directors and officers of corporations a majority of the stock of which is owned by the Government, and the direction of the operations of those corporations through the exercise of that power, are not legislative functions. They do not constitute the making or repealing of laws or anything incidental to such legislative action. The voting of the Government's stock is itself not legislative, and the depriving the Governor General of all control of the operations of these corporations is in direct violation of that provision of the Organic Act contained in Section 22, which provides that all executive functions must be under the Governor General or within one of the executive departments under his supervision and control. It is not material whether the relation of the Philippine Government to these corporations is proprietary or sovereign, or whether the corpora-

tions are engaged in performing sovereign governmental functions or conducting private business. The power of the Philippine Legislature over matters in which the Philippine Government acts in a proprietary capacity is legislative. It has no more power to exercise administrative or executive functions over proprietary interests of the Government than it has over sovereign governmental functions, and the exclusion of the Legislature from participation in administrative or executive functions, and the granting of those functions to the Governor General and his subordinates, operate on all governmental matters whether proprietary or sovereign.

II. If membership on the "Board of Control" or "Committee" is a separate post or position from that of Governor General or of President of the Senate or of Speaker of the House of Representatives, then the selection by the Legislature or by either House of the persons to occupy that position is beyond legislative power, because in itself an executive act. If the functions to be exercised by members of the Board of Control or Committee are executive or administrative in character, the selection of those members is not a legislative act.

The ultimate question here is again whether voting the stock and directing the affairs of these corporations are executive functions and it is not important whether the position on the Board of Control or Committee is a separate office or post, or whether the Legislature has merely added certain

duties to those of the President of the Senate and the Speaker of the House of Representatives. It may not make appointments to executive or administrative positions, and it may not confer executive or administrative functions on legislative officials.

III. That Congress has not taken any action to affirmatively annul these statutes is of no consequence. The power reserved in the Organic Act to annul Acts of the Philippine Legislature relates to valid Acts passed under authority of the Organic Act and consistent with it. It was never contemplated that Acts of the Philippine Legislature, void because in conflict with the Organic Act, would become valid unless their invalidity be reiterated by Congress within a reasonable time. There is nothing in the Organic Act, nor in the decisions of this Court, which justifies the conclusion that an Act of the Philippine Legislature in conflict with the Organic Act becomes adopted by Congress as valid legislation through its failure to pass an Act annulling that which is already null.

ARGUMENT

I

THE VOTING OF THE SHARES AND DIRECTION OF THE CORPORATIONS' AFFAIRS INCIDENT TO THE VOTING POWER ARE EXECUTIVE FUNCTIONS, OF WHICH, UNDER THE ORGANIC ACT, THE LEGISLATURE MAY NOT DEPRIVE THE GOVERNOR GENERAL

The Organic Act is the constitution of the Philippine Islands. In framing it Congress has

made the distribution of powers among three departments familiar under our constitutional system. The separation of powers is the distinctive feature of the American constitutional system. *Kilbourn* v. *Thompson,* 103 U. S. 168.

In *Abueva* v. *Wood,* 45 Phil. 612, it was said (pp. 622, 632):

> The Government * * * in the Philippine Islands is divided under its charter or constitution (the Organic Act) into three great, separate, distinct, and independent departments; the executive, the legislative, and the judicial. * * *
>
> * * * Under the theory of the three distinct and independent departments of the government, it was not intended that one should encroach upon the field of duty of the other. * * *

The provisions of the Organic Act show that the legislative authority is vested in the Philippine Legislature and the executive authority in the Governor General. Such overlapping of the authority as exists is within the usual limits and is to be strictly limited. *Myers* v. *United States,* 272 U. S. 52. The Senate participates in the appointing power through confirmations, and the Governor General participates in legislation by his veto. In Section 20 the Legislature was given power to choose two resident commissioners to the United States. In other respects there is a clean-cut division of powers, with the implication that neither of the three departments may exercise any of the powers pertaining to the others.

These principles are recognized by a long line of Philippine decisions:

> *Barcelon* v. *Baker* (1905), 5 Phil. 87, 115.
> *United States* v. *Bull* (1910), 15 Phil. 7, 27.
> *Severino* v. *Governor General* (1910), 16 Phil. 366.
> *Alejandrino* v. *Quezon* (1924), 46 Phil. 83, 96.

The Organic Act provides that the supreme executive power shall be vested in the Governor General and that he shall have general supervision and control of all the departments and bureaus of the Government and be responsible for the faithful execution of the law, with the power to appoint officers by and with the advice and consent of the Senate. But the Organic Act does not stop there. It continues, in Section 22, to be most explicit in saying:

> That all executive functions of the Government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General.

The legislative power and that only is given to the Legislature. See *Myers* v. *United States, supra.*

There can be no dispute about these matters. The real question is whether the Acts creating the Board of Control and the Committee operate to withdraw from the Governor General or vest *ex officio* in legislative officers functions which are executive or administrative in their nature.

Since members of the Board of Control and of the Committee are public agents they may act by majority vote in the absence of any provision of law to the contrary. All the powers incident to the exercise of the functions of the Board or Committee may be exercised by the concurrent action of the President of the Senate and the Speaker of the House of Representatives. There is withdrawn from the Governor General the power to act except with the concurrence of one legislative official. In the case of the National Coal Company, the voting power carries with it the power to elect directors and the power to remove them. The General Corporation Act, which applies to the Coal Company, authorizes the removal of corporate directors by a vote of two-thirds of the stock at any regular meeting or special meeting called for that purpose. The by-laws of that corporation provide for the prompt calling of stockholders' meetings. (R. 15.) By reason of these interlocking provisions the "Committee" designated by the Legislature exercises continued direction over the operations of the Coal Company. Directors who do not do the bidding of the Committee may be promptly removed.

In the case of the National Bank, the control of the two branches of the legislature over the Bank's operations is even more direct. Not only may the Board of Control remove and appoint directors at will, through the exercise of the voting power at regular or special meetings of the stockholders, but

it participates in the selection of the general manager, who is the chief executive, and the board of directors may not act on a number of matters connected with the operations of the Bank without the concurrence and consent of the Board of Control. Adding to this the fact that the President of the Senate and the Speaker of the House of Representatives themselves hold those positions, and consequently their *ex officio* positions on the Board and Committee, at the pleasure of the respective Houses of the Philippine Legislature, and only so long as they satisfy the respective majorities of those Houses, it is apparent that the two Houses of the Philippine Legislature, acting through their chosen representatives, are from day to day directing the affairs of these two corporations. No one can doubt, because of these interlocking provisions and conditions, that those conducting the Bank's affairs are directly subservient to the Legislature in the conduct of the business of the Bank and the Coal Company. With the President of the Senate and the Speaker of the House acting together, the Governor General is deprived not only of the power to vote the Government's shares and to select managing agents and directors of these institutions, but of any supervision or direction over the operations of either corporation. There is more here than the legislative appointment to a position or office executive in nature; there is a continued and complete direction and control of the daily operations of

these corporations, according to the will of the majorities of the Houses of the Legislature and their leaders.

If the voting of the stock and the exercise of direction and control over the operations of these corporations are executive functions, then the provision in the Organic Act that the executive functions of the Government must be directly under the Governor General or within one of the executive departments under his supervision and control has been violated.

The petitioners and the Government seem to be in accord on the point that the ultimate question in this case is whether the voting of the stock and the exercise of continued direction and supervision over the daily operations of these two institutions, resulting from the voting power and the other provisions of law, are executive functions.

The answer to this question seems self-evident. It is found in the opinion of the court below in the *National Coal Company Case* (R. 100), where it was said:

> The administrative domination of a governmentally organized and controlled corporation is not a duty germane to the lawmaking power.

Executive power is the general administrative control of those executing the laws. *Myers* v. *United States,* 272 U. S. 52. Legislative power is the power "to make laws and to alter and repeal them." Cooley, Constitutional Limitations, 7th

Ed., p. 131. Legislatures have incidental powers, such as the power to appoint their own officers and assistants, deal with the quarters they occupy, and through committees, commissions, or otherwise, collect information as a guide to legislation, but no accepted definition of legislative power is broad enough to include the act of voting the stock of a corporation whose shares are owned by the Government and the selection and removal of the corporation's managing officers and agents and participation in and direction and control over the daily operations of such a corporation. The enactment of the laws defining the powers and activities of corporations organized and controlled by the Government and defining generally the power and duties of executive officials charged with the operations and supervision of such corporations and prescribing rules to guide the conduct of such officers and agents of the Government are legislative functions, but the execution of those laws, the selection of the men to execute them, and the administrative supervision and direction of the affairs of such corporations within the limits and rules prescribed by the legislature, are executive or administrative functions.

If the functions of the members of the Board of Control and Committee are legislative in character as contended by the petitioners, then, it may be asked, how can the act of the Legislature in naming the Governor General to places on each be justified? He is an executive, and it is beyond the power of

the Legislature to bestow legislative functions on him.

The uniform practice of our own Government has been to treat the administrative domination of a governmentally organized and controlled stock corporation as an executive function and not a duty germane to the law-making body. In no instance has Congress claimed or the President conceded that the right to vote Government-owned shares of stock rested in any one except in the President himself or men appointed by him, although by law the approval of the Senate has sometimes been necessary in the choice of directors.

The First Bank of the United States, organized by the Act of February 25, 1791 (c. 10, Section 11, 1 Stat. 191, 196) issued stock of which the President was authorized to subscribe for a part on behalf of the United States. Nothing was said in the Act as to the voting power, and we have been unable to find what official voted the shares on behalf of the United States, although it is probable that the Secretary of the Treasury did so.

The charter of the Second Bank of the United States (Act of April 10, 1816, c. 44, 3 Stat. 266) provided that a minority of the shares should be subscribed for by the United States; that the management of the corporation should be vested in 25 directors, five of whom were to be appointed by the President, by and with the advice and consent of the Senate, and the others by vote of the stockholders other than the United States.

By the Act of March 3, 1825 (c. 76, 4 Stat. 124), the Secretary of the Treasury was authorized to subscribe to shares of the Chesapeake and Delaware Canal Company, and it was provided that the Secretary of the Treasury should vote such shares for the directors and president of the corporation.

By the Act of March 2, 1829 (c. 27, 4 Stat. 350), the Secretary of the Treasury was authorized to subscribe to additional shares of the Chesapeake and Delaware Canal Company and also to shares in the Dismal Swamp Canal Company, and it was provided:

> That the Secretary of the Treasury shall vote for president and directors of the said companies respectively, according to such number of shares.

When the United States bought the property of the Panama Canal Company in 1904 it took 69-70ths of the capital stock of the Panama Railroad Company. By Executive Order of May 9, 1904, the President placed the Isthmian Canal Commission under the direction of the Secretary of War. The United States now owns all the stock of the Panama Railroad Company. (Report of the Isthmian Canal Commission, 1905, p. 18.) It is held in the name of the Secretary of War except for directors' qualifying shares, and the Secretary of War votes directly or by proxy the shares which are in his name.

The Federal Farm Loan Act (Act of July 17, 1916, c. 245, 39 Stat. 360) created farm loan banks

and provided that the Secretary of the Treasury should subscribe in behalf of the United States for all stock not taken within 30 days after the opening of the books for subscription. The Act provided that the Farm Loan Board should be appointed by the President by and with the advice and consent of the Senate, and that the Board should appoint the Government's directors on the land banks. The Act provided that three of the nine permanent directors of each Federal Land Bank should be appointed by the Federal Farm Loan Board. The Agricultural Credits Act of 1923 (Act of March 4, 1923, c. 252, 42 Stat. 1454, 1474) provided that the Federal Farm Loan Board should appoint three of the directors of each Federal Land Bank, and that the loan associations and the borrowers should nominate candidates, and from the three candidates standing highest on the list the Farm Loan Board should choose another director. The same Act provided, as amendments to Sections 201 and 205 of the Federal Farm Loan Act, that in each of the twelve cities in which there was a Federal Farm Loan Bank a Federal Intermediate Credit Bank should be established with a capital stock of $5,000,000, to be subscribed and held by the United States, and that the officers and directors of the several land banks should be *ex officio* officers and directors of the Federal Intermediate Credit Banks.

The Food Control Act of August 10, 1917, Section 2 (c. 53, 40 Stat. 276), authorized the President to create agencies for carrying out the pur-

poses of the Act. Thereupon the President issued Executive Order No. 2681, directing the formation of the Food Administration Grain Corporation under the laws of Delaware, all of the capital stock of which was purchased for the United States. The order named four directors and provided that three more should be chosen by the incorporators and that they be subject to change by and with the approval of the President, and that all officers of the corporation should be selected with the consent and approval of the President. Under the same Act, the President on July 8, 1918, authorized the formation of the United States Sugar Equalization Board, Inc., the entire stock to be held by the United States except qualifying shares. The President directed that the shares of the stock standing in the name of the United States should be voted by the Food Administrator or some one designated by him. (See Hearings before the Committee on Agriculture, House of Representatives, 63d Cong., 3d Sess., on H. J. R. 444, pp. 102, 124, Official Bulletin July 12, 1918.)

The Act of September 7, 1916 (c. 451, 39 Stat. 728), provided for the establishment of the United States Shipping Board, the members of which are appointed by the President. Section 11 authorized the Board to incorporate the Emergency Fleet Corporation with a capital stock of $50,000,000 and to subscribe for and vote not less than a majority of the stock.

The War Finance Corporation Act of April 5, 1918 (c. 45, 40 Stat. 506), created the War Finance Corporation, with a capital stock of $500,000,000, to be subscribed by the United States, provided that the directors should be the Secretary of the Treasury and four other persons to be appointed by the President with the advice and consent of the Senate, and declared that any director should be subject to removal by the President. By the Act of August 24, 1921 (c. 80, 42 Stat. 181), the Secretary of Agriculture was added to the board of directors.

By the Act of June 4, 1918 (c. 92, 40 Stat. 594, 595), the President was authorized to create a corporation to provide housing for war needs, with a capitalization not exceeding $60,000,000. It was provided:

> That where such corporation or corporations are created by authority of the President, representatives appointed by the President, or by such agency as he may designate to carry out the purposes of the said Act, shall subscribe to, own, and vote the capital stock thereof for and on behalf of the United States.

The United States Housing Corporation was organized under the laws of New York. (Report of the United States Housing Corporation, 1920, Vol. I, p. 59.)

The Act of July 9, 1918 (c. 143, chap. XVI, 40 Stat. 845), authorized the Director of Aircraft Production to form one or more corporations to

aid in aircraft production, and provided that he might, on behalf of the United States, subscribe for, purchase, and vote not less than a majority of the voting capital stock. Under this Act the United States Spruce Production Corporation was incorporated under the laws of Washington. The Director of Aircraft Production subscribed, on behalf of the United States, for all of the shares except qualifying shares. (Handbook of Economic Agencies of the War of 1917, p. 436; History of the Spruce Production Division, 83.)

Following the recommendation of the War Trade Board to the President, on October 1, 1918, and with his approval, that board organized under the laws of Connecticut the War Trade Board of the United States Russian Bureau, Inc., with a capital stock of $5,000,000, the shares being owned by the United States, and the board consisted of members of the War Trade Board, and the officers were all members or employees of the War Trade Board. (Report of the War Trade Board, 204; War Trade Board Journal, No. 16, p. 4.)

The Inland Waterways Corporation was created as a corporation of the District of Columbia by the Act of June 3, 1924 (c. 243, 43 Stat. 360), with a capital of $5,000,000 furnished by the United States. The Act provided:

> The Secretary of War shall govern and direct the corporation in the exercise of the functions vested in it by this Act.

If voting Government-owned shares of the stock of corporations and if directing and controlling the operations of corporations in which the Government owns shares of stock are legislative functions, the unbroken practice to the contrary is hard to explain.

In *Clark* v. *Stanley*, 66 N. C. 59, the court considered the validity of a statute by which the President of the Senate and the Speaker of the House of Representatives of the legislature of North Carolina were authorized to appoint proxies and directors for corporations in which the State was a shareholder. The court said (p. 65):

> Suppose an act: Whereas, experience has proved, that the Governor has made an ill use of the power of appointment, it is enacted: There shall be two fit persons to be styled "appointors general," whose duty it shall be to appoint all public officers and to fill all vacancies.
>
> SEC. 2. It is further enacted: "The president of the senate and the speaker of the house of representatives, shall be the appointors general."
>
> This act is clearly unconstitutional; for, in the first place, in order to create this new office, it takes from the Governor a duty or function vested in him by the Constitution; and in the second place, the general assembly fills the office by its own appointment, contrary to the express veto of that instrument.
>
> This is the case under consideration. True, it is on a larger scale and covers more

ground; but although differing in degree it is the same in principle. A new office is created; it is not so in name, but is in effect the office of "appointors for officers in all corporations in which the State is a stockholder," and in order to create the office a duty or function of his office is taken from the executive, and the appointment of these "appointors for corporations" is made by the general assembly.

If it be said, there is this distinction: The "appointors general" in the supposed act are to appoint all State officers, whereas the "appointors for corporations" are confined to State proxies and directors, and these are not officers of the State, but of a corporation in which the State is a stockholder. The reply is: This is a distinction without a difference,—even should it be conceded that the proxies and directors are not public officers—into which question we will not enter, for our concern is with the office of "appointors for corporations," and not with the persons they may appoint to these offices. To the suggestion, the act of April, 1871, does not purport to create an office or to fill it, the reply is: Such, obviously, is the legal effect of the act. When analyzed, it will be found to contain two provisions: There shall be an agency for the State to make the appointment of all State proxies and State directors in corporations. This creates a public office and it can make no difference that it is called the office of appointors of State officers for corporations, or has no name given to it; in the

> second place, the officers who are to discharge this duty are appointed by the general assembly.
>
> We declare our opinion to be, that the statute is unconstitutional, and that the relators are not entitled to the offices claimed.

In the case of *Howerton* v. *Tate*, 68 N. C. 546, the court said (p. 548):

> *Clark* v. *Stanley* decides that the legislature can not authorize the presiding officers of its two branches to appoint proxies and directors in all corporations in which the state has an interest.
>
> We argue from this that they could not authorize a committee of their body to do so * * * it would be an usurpation of executive power. * * *

In *Stockman* v. *Leddy*, 55 Colo. 24, the court considered an act of the legislature creating a committee of its own members to protect the water rights of the State. The court held the act unconstitutional, saying (p. 31):

> The General Assembly not only passed an act—that is, made a law—but it made a joint committee of the Senate and the House its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the General Assembly to confer executive power upon a collection of its own members.

It seems to us unimportant whether the Philippine Government as owner of these shares is a mere proprietor or is acting in a sovereign capacity, or whether the corporations are or are not agencies

for the exercise of sovereign powers. In the *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, it was said that when the Government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. See also *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123. The mere ownership by the Government of stock in a corporation may not make that corporation a Government agency or clothe the corporation with the attributes of sovereignty. On the other hand, where all of the shares are owned by the Government and the corporation is exercising sovereign functions for the Government, the powers of the corporation itself are governmental in character and its property and operations have sovereign qualities. *Clallam County* v. *United States*, 263 U. S. 341; *United States Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, No. 113, October Term, 1927. The Philippine National Bank in some respects is performing sovereign functions. It acts as fiscal agent of the Government; it issues circulating notes, the redemption of which has been guaranteed by the Philippine Government. (Act No. 3174, approved November 24, 1924, Vol. 20, Public Laws of the Philippine Islands.) According to the report of the Philippine Commission to the Secretary of War, dated April 6, 1916, relating to the Philippine National Bank, "Its fundamental purpose is to provide additional credit facilities for

the development of agriculture and industry, which have been greatly retarded in the past by the usurious rates of interest charged for the use of capital." In some respects the Philippine National Bank is, of course, conducting an ordinary banking business. The Coal Company's business, on the other hand, is confined to coal mining operations not limited to coal deposits on the public domain. In Section 14 of Act No. 2719 of the Philippine Legislature, it was said: "The Government of the Philippine Islands, recognizing the relation of the coal resources of the country to its general welfare, reserves the right to work and exploit coal mines itself or organize and promote coal mining corporations by becoming either exclusive or majority stockholder therein." See also Report of the Governor General for 1918, page 8; *National Coal Co.* v. *Collector of Internal Revenue*, 46 Phil. 583.

Government owned and controlled corporations are proper instruments for the accomplishment of a public purpose. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *The Bank of the United States*, 9 Wheat. 739; *United States Shipping Board Emergency Fleet Corporation* v. *Western Union Telegraph Co.*, decided January 3, 1928. The use of public funds to buy shares in corporations is justifiable only where a public purpose is to be accomplished. Cooley on Taxation 4th ed., Vol. 1, Sec. 211. *Opinion of the Justices*, 204 Mass. 607.

Section 4 of the Organic Act provides:

> * * * all expenses and obligations contracted for the internal improvement or development of the Islands, not, however, including defenses, barracks, and other works undertaken by the United States, shall, except as otherwise specifically provided by the Congress, be paid by the Government of the Philippines.

In the absence of any restrictions on the power of the Philippine Government to engage in banking and coal-mining operations with a view to developing the natural resources of the Islands and improving the facilities for commerce, it may be that enterprises like these are authorized, but it seems quite immaterial whether the activities of the Government in relation to these corporations are proprietary or sovereign. They are certainly public governmental activities, and it has never been suggested that in dealing with matters in which a government is engaged in a proprietary capacity in the public interest, the division of powers into three departments and the exclusion of the legislature from the exercise of anything but legislative functions are inapplicable. The separation of powers effected by the Organic Act of the Philippine Islands relates to all powers which may be exercised by the Philippine Government, whether it is acting in a proprietary or sovereign capacity.

In Section 9 of the Organic Act, relating to property of the Philippine Government, it is said, "the

Philippine Legislature shall have power to legislate with respect to all such matters as it may deem advisable," but this is a power to enact legislation and not to exercise executive functions. The petitioners make the vague statement that the "duty of caring for Government property" is legislative in character. That depends on what is meant by the "duty of caring for property." Whatever the legislature may do respecting caring for Government property must be in the form of legislation; that is, the enactment of laws and the establishing of rules and principles to be followed by executive officers in dealing with the Government's property. If caring for Government property requires administrative action, that part of the task may not be performed by the Legislature or added to the duties of legislative officers. Caring for Government property in the sense of executing the laws and general directions prescribed by the legislature is executive in character. The legislation here consists in the Acts organizing these corporations, defining their powers and duties, and directing how they shall operate and what transactions they shall engage in. The execution of those laws involves the voting of the stock, the selection of managing agents and directors, and the supervision and control of the corporations' affairs in conformity with the rules prescribed by legislation. The Legislature is not enacting any legislation when it votes stock or selects directors, or removes or appoints

managing agents, and thus, through its representatives, selected by it and removable at its will, runs the business of these institutions.

The statutes here assailed are only part of a number enacted in pursuance of a plan of the Philippine Legislature to strip the Governor General of executive power. Similar provisions giving the President of the Senate and the Speaker of the House, *ex officio*, control over nationally organized and controlled stock corporations are found in the following cases:

Act	Name	Authorized capital
		Pesos
2814	National Petroleum Co.	500,000
2849	National Development Co.	50,000,000
2855	National Cement Co.	500,000
2862	National Iron Co.	500,000

The result of operations of the National Bank under legislative control is indicated by Act No. 3174, approved November 24, 1924, which is entitled an Act to "rehabilitate" the Bank. Possibly, the executive would not have done better.

In the Annual Report of the Governor General for 1926, page 5, the situation is summed up by saying:

> If the Legislature may validly engraft executive functions upon existing legislative officers, the logical result will be the ultimate assumption by the legislature of all executive functions relating to statutes enacted by it, and the Governor General will become a mere figurehead.

II

IF THE MEMBERS OF THE BOARD OF CONTROL AND OF THE COMMITTEE EXERCISE EXECUTIVE FUNCTIONS, THEN THE SELECTION AND APPOINTMENT OF THE MEMBERS IS ITSELF AN EXECUTIVE FUNCTION WHICH MAY NOT BE PERFORMED BY THE LEGISLATURE

The Legislature no doubt may make appointments to legislative positions, and it is equally clear that it may not make appointments to executive offices or posts. To determine in this case whether the act of making an appointment to a position on the Board of Control or Committee is in itself an executive function requires a decision as to whether the functions of the members are executive or legislative. If they are executive, then the point made in paragraph I of this brief is sound and it is unnecessary to go further. If the functions of these positions are legislative in character, then there is nothing to our contention that the Governor General has been deprived of any power that belongs to him in the control of these corporations, and it is equally clear that the act of appointment to places on the Board and Committee is not beyond the legislative authority.

So the argument that making appointment to places or positions on the Board or Committee is in itself an executive function brings us back to the question already dealt with as to the character of the functions of the members of the Board and Committee, and is merely ringing the changes on the single question in the case. But if the subject be ap-

proached from this angle it is not necessary to determine whether a place on the Board of Control or the "Committee" created by these Acts is an office or position separate and distinct from the offices of the Governor General, President of the Senate and Speaker of the House of Representatives, the incumbents of which *ex officio* serve on the Board and Committee. We think, especially in the case of the Board of Control, that a place on these bodies is a distinct office or position, held *ex officio,* but if not, and if the effect of these statutes is merely to add to the duties of the offices of President of the Senate and Speaker of the House of Representatives, then the Acts conferring these functions on members of the legislative body are invalid, because conferring on them executive functions in the voting of the stock, selection and removal of managing officers and agents, and the supervision and direction of the affairs of the corporations.

In *Kilbourn* v. *Thompson,* 103 U. S. 168, it was said (p. 191):

> It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Looking at the places on the board of control and committee as separate posts or positions, it is not

important to determine whether the incumbents are "officers" or whether they are mere agents or servants of the Government. The words "office" and "officer" are sometimes given special meanings, according to the particular connection in which they appear. See *Myers* v. *United States*, 272 U. S. 52; *United States* v. *Strang*, 254 U. S. 491.

The underlying question is whether functions exercised by those who serve on the Board of Control and Committee are executive or legislative in character. If executive, then the selection of the persons to fill those places and who execute executive functions is in itself an executive function (*Myers* v. *United States*, pp. 129–131), and it makes no difference whether the incumbent of the place is an "officer" or a mere agent or servant.

That places on the Board or Committee are "public stations, permanent in character, created by law, whose incidents and duties are prescribed by law," seems clear. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514; *United States* v. *Hartwell*, 6 Wall. 385. *In re Members of the Legislature*, 49 Fla. 269. Article 401 of the Penal Code of the Philippine Islands, in effect at the time of the enactment of the Organic Act in 1916, defined an officer as "any person who, by direct provision of law, popular election, or appointment by competent authority, shall take part in the performance of duties in the public service."

The Legislature has power to enact legislation providing that an executive officer or agent of the

Government, appointed by the executive power, may exercise *ex officio* the functions of some other executive office. As to the person in the first office when such legislation is enacted it is not necessary that he be reappointed by the executive, and as to those appointed by the executive after such legislation is enacted, the executive appointment operates to fill both places. *Shoemaker* v. *United States*, 147 U. S. 282. For the Legislature to attempt to appoint a legislative official appointed by and holding office during the pleasure of the legislature or one of its branches to an executive post, by giving him the power *ex officio* to discharge executive functions, is an entirely different matter. In such a case, and this is one, the legislature makes the appointment when it fills the legislative office, the incumbent of which *ex officio* discharges the duties of the executive position.

In Report No. 2205, 55th Congress, 3rd Session, House Report, Vol. 2, will be found an elaborate report by the Judiciary Committee of the House as to what constitutes an office. There the committee dealt with that provision of Section 6 of Article I of the Constitution to the effect that "no person holding any office under the United States shall be a member of either House during his continuance in office." It did not deal with the question of appointment by the legislature to places having executive functions.

In some instances Congress has created corporations and designated their managing officers.

The Smithsonian Institution is governed by a board of regents composed of the Vice President, the Chief Justice of the United States, three members of the Senate, and three members of the House, with six other persons. The members of the Senate are appointed by the President of the Senate and the members of the House by the Speaker, and the six other persons by joint resolution. (U. S. C. Title 20, sections 41–67.)

The National Home for Disabled Volunteer Soldiers was incorporated by an act of Congress which provided that the President, the Secretary of War, the Chief Justice, and other persons associated with them should constitute a corporation to have perpetual succession. These three officials, with seven other persons, constitute the Board of Managers. The seven are named by joint resolution of Congress for definite terms of six years. (U. S. C. Title 24, Section 71 et seq.)

There is also the Commission controlling allotment of space in public buildings in the District of Columbia, two members of which are Senators appointed by the President of the Senate and two of which are Representatives appointed by the Speaker of the House to hold office while they remain members of Congress. If this commission regulated only the assignment of quarters in buildings devoted to legislative use, the propriety of appointment of its members by Congress would be obvious, but the Capitol Building and Senate and House Office Buildings are not within its jurisdic-

tion. In so far as it performs the function of assigning quarters to executive officers, in buildings used housing executive departments, the Act is open to question. (U. S. C. Title 40, section 1, et seq.)

In Congressional Report No. 2205, above referred to, reference is made to various commissions, the members of which were appointed by Congress or its Houses. In so far as these commissions perform the function of collecting information preliminary to legislation, such appointments were proper. Wherever any commission or body exercises functions of an executive nature, the appointment of members of it by Congress is clearly open to serious question. Such cases have not been frequent and never have been tested in the courts. It may be said of them that they show how insidious may be the encroachments of the legislature upon the executive authority. As against these cases we have the unbroken practice, legislative and executive, in relation to stock corporations, shares of which have been owned by the United States.

> In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the Government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the

> question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized. (*Myers* v. *United States*, 272 U. S. 52, 170–171.)

III

IF THE ACTS OF THE PHILIPPINE LEGISLATURE IN QUESTION WERE IN CONFLICT WITH THE ORGANIC ACT AND VOID, THE FACT THAT CONGRESS DID NOT DECLARE THEM VOID HAS NOT RENDERED THEM VALID

Section 19 of the Organic Act provides:

> All laws enacted by the Philippine Legislature shall be reported to the Congress of the United States, which hereby reserves the power and authority to annul the same.

The petitioners contend that the acts here questioned were reported to Congress, which for some years has taken no steps in the matter, and that it is therefore to be inferred that Congress has ratified or adopted and made valid this legislation. On just what date this ratification or adoption became effective, and there was a transition from invalidity to validity, is not made clear.

The provision quoted only called for action by Congress with respect to valid legislation of the Philippine Legislature. It is not pointed out why Congress should have assumed to annul by legislation an act of the Philippine Legislature which was already void because in conflict with a prior act of

Congress. The duty of declaring invalid legislation void rests with the courts. In the case of *Tiaco* v. *Forbes*, 228 U. S. 549, 558, in considering whether an act of the Philippine Legislature was within its powers or in conflict with the Philippine Bill of Rights, the opinion states, "It is worthy of mention that the law under consideration was reported to Congress and has not been annulled," but the Court based its decision on the ground that the act in question was not in conflict with the Philippine Bill of Rights.

In *Clayton* v. *Utah*, 132 U. S. 632, 642, it was said:

> It can hardly be admitted as a general proposition that under the power of Congress reserved in the Organic Acts of the territories to annul the acts of their legislatures the absence of any action by Congress is to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of Congress under which they were created.

And in *Berryman* v. *Whitman College*, 222 U. S. 334, in which a statute of the Territory of Washington was set aside because in conflict with the Organic Act, notwithstanding inaction by Congress for twenty-two years after its passage, the Court said (p. 353):

> The only principal contention remaining unnoticed is the alleged acquiescence of Congress in the grant of exemption resulting from its failure to disapprove the act of 1883. The foundation, however, upon which

> that contention rests has been decided to be without merit. *Clayton* v. *Utah*, 132 U. S. 632, 642.

See also *A., T. & S. F. Ry. Co.* v. *Sowers*, 213 U. S. 55, 64. The opinion of the Court in *Fajardo Sugar Co.* v. *Holcomb*, 16 F. (2d) 92, must be read in the light of what was said by the same court in *Gallardo* v. *Porto Rico, etc., Company*, 18 F. (2d) 918, 923, as follows:

> Its failure to annul has some, though not controlling, weight. * * * This proposition goes too far. Failure to annul is not the full equivalent to adoption.

There is nothing in the Organic Act or in the decisions of this Court to support the contention that the acts of the Philippine Legislature here assailed, if void, because in conflict with the Organic Act, became valid at some undetermined date because Congress has not performed the useless act of enacting a statute declaring them void.

CONCLUSION

The acts of the Philippine Legislature, in so far as they deprive the Governor General of the power to vote the Government's shares of stock in the Philippine National Bank and the National Coal Company, and deny him the power to select the managing directors and officers of those corporations and exclude him from any control or supervision over the current operations of these corporations, are in plain conflict with the Organic Act. The invalidity of the amendatory acts relating to the National Bank, creating a Board of Control,

leaves in operation the original statute vesting the voting power in the Governor General. The invalidity of the provision in the charter of the Coal Company, vesting the voting power in a committee, leaves no statute prescribing who shall vote the stock of that corporation, but in that situation, power to vote it being an executive function, by necessary operation of the provisions of the Organic Act that power must be exercised by the Governor General or under his direction. The judgments of the Supreme Court of the Philippine Islands should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
FREDERICK C. FISHER,
Special Counsel.
WILLIAM CATTRON RIGBY,
Lieutenant Colonel, Judge Advocate.
HUGH C. SMITH,
Lieutenant Colonel, Judge Advocate.
ROBERT P. REEDER,
Special Assistant to the Attorney General.
JOHN A. HULL,
Major General,
The Judge Advocate General,
DELFIN JARANILLA,
Attorney General of the
Philippine Islands,
Of Counsel.

APRIL, 1928.

○